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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRENT ANDREW SILVESTRINI, Defendant and Appellant.	B266632 (Los Angeles County Super. Ct. No. BA432644)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After a methamphetamine binge, defendant Brent A. Silvestrini encountered Darryl White and his Chihuahua, Girlie, at a bus stop. White was carrying Girlie in a grocery bag. Defendant wanted to buy Girlie but White was not interested in selling her. When White refused to sell the dog, defendant became angry and told White to give him the "motherfucking dog." Defendant grabbed one of the straps of Girlie's bag; a struggle ensued. Bystanders flagged down a passing patrol car, the police intervened, and Girlie was returned to White. Defendant was charged with and convicted of one count of second degree attempted robbery. (Pen. Code, § 664/211.) Defendant's sole contention on appeal is that the trial court committed prejudicial error by preventing his mother from testifying that he once had a small dog named Rowdy. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

By information filed February 24, 2015, defendant was charged with one count of second degree attempted robbery (Pen. Code, § 664/211). Defendant pled not guilty and in June 2015 the matter proceeded to a four-day jury trial.

2. Prosecution Evidence

On January 6, 2015, around 9:00 a.m., Darryl White was standing near a bus stop at Crenshaw and Martin Luther King Boulevards with a Chihuahua named Girlie. White, who had purchased the dog for his wife, was carrying Girlie in a Wal-Mart bag. Defendant approached White and asked him for a light. After White gave him a light, defendant asked White where he got the dog and how much she cost. White told defendant that Girlie had a street value of $800 but would cost a thousand dollars at a store. Defendant liked Girlie and said he wanted the dog for his own wife. Defendant offered to buy Girlie for $800, but White said the dog was not for sale. Defendant then told White to put the bag down because he was going to take Girlie.

After White asked him if he was serious, defendant responded: "Set the bag down because I'm going to take the motherfucking dog." Defendant, who by this point was physically blocking or lunging at White, ordered him to put the bag down several times. By that point, the conversation had grown very heated. Defendant raised his voice, told White he was a "dead motherfucker," and became more boisterous. Defendant then grabbed one of the straps of Girlie's bag and struggled with White over it. White was concerned for his safety and thought someone would get hurt, killed, or jailed.

Two men near the bus stop intervened and separated defendant and White. Meanwhile, a crowd had started to gather at the bus stop, and someone flagged down a passing patrol car. Police officers arrived at the scene and spoke to both defendant and White about the incident. Defendant insisted the dog was his, as did White. Eventually, White got Girlie back.

3. Defense Evidence

The defense presented evidence that defendant's voluntary intoxication prevented him from forming the specific intent to rob White of his dog. Defendant's mother testified that defendant was 35 years old at time of trial and has had a drug problem, off and on, since he was 18. The day before the incident, defendant called her at 3:00 in the morning "raging, ranting, not making any sense." Defendant's mother was so concerned by his ranting and raving that she called the police. She had no doubt that he had taken drugs.

Defendant testified that he had not slept from January 1 to January 5, 2015 because he had been using methamphetamine. He also testified that he did not sleep on January 6, 2015 and was still feeling the effects of methamphetamine that day. Defendant admitted demanding Girlie from White in a loud voice. He claimed, however, that Girlie reminded him of a younger version of Rowdy, the dog defendant had from the time he was in high school until he was 31 years old. Defendant thought that

White, who looked like a female patient from his drug rehabilitation program, was putting Rowdy in danger by crossing a busy street with the dog in a bag close to his ankle. Although Girlie and Rowdy were different colors, and Rowdy was dead, defendant was seeing "speed demons" and attributed his confusion to sleep deprivation. After defendant asked White how much Girlie cost, defendant started to believe Girlie was really Rowdy, and that White was really a female drug user that had taken Rowdy from defendant.

Dr. John Treuting, a forensic and clinical toxicologist, testified that methamphetamine is a very powerful, long-acting, central nervous system stimulant affecting the brain. He explained that many methamphetamine users experience hallucinations or delusions which could lead them to be aggressive or violent. Dr. Treuting opined that a person, like defendant, who had used methamphetamine over a protracted period of time would still have circulating levels of the drug in his system. As a result, the drug could affect the individual's ability to process information and lead to confusion and irrational thought. He also stated, however, that a person who had used methamphetamine for five or six days can still make decisions about what is right or wrong.

4. Verdict and Sentencing

On June 12, 2015, the jury convicted defendant of second degree attempted robbery. The trial court sentenced him to two years in county jail and imposed applicable fines and fees. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends the trial court denied him the right to present a defense by preventing his mother from testifying that he once had a small dog. Specifically, defendant argues the court prejudicially erred by sustaining a relevance objection to the following question: "Did [defendant] use to have a small dog?"

Defendant explains that the "proffered evidence would have corroborated [his] testimony that at the time he demanded that White put the dog down, he genuinely believed [Girlie] was his old dog, a Chihuahua named Rowdy."

We apply the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) We recognize, however, that a court's evidentiary ruling must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) Accordingly such a ruling, if erroneous, is "an error of law merely," which is governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1103.) That is, where a court's ruling did not constitute a refusal to allow a defendant to present a defense, but merely rejected certain evidence concerning the defense, the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to the defendant. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Page* (1991) 2 Cal.App.4th 161, 185.)

As a preliminary matter, we agree with defendant that the excluded evidence was relevant in that it would have corroborated an aspect of his voluntary intoxication defense: he once had a small dog, Rowdy, and defendant was so impaired from his recent methamphetamine binge that he thought Girlie was Rowdy. (See *People v. Hess* (1951) 104 Cal.App.2d 642, 676 [evidence is relevant when no matter how weak it is, it tends to prove a disputed issue].) We are not convinced, however, that

defendant's mother's testimony about Rowdy was critical to defendant's defense, or that its exclusion amounted to the exclusion of a defense rather than evidence concerning a defense.

Here, defendant was permitted to testify at length that he had a dog named Rowdy that looked like Girlie, and that he thought Girlie was his former dog Rowdy. In addition, during his closing argument to the jury, the prosecutor never challenged defendant's testimony that he once had a dog named Rowdy. Instead, the prosecutor argued that defendant knew White's dog was not Rowdy because defendant "never said give me Rowdy back." In light of defendant's testimony and the prosecutor's argument, we find no constitutional violation. (See *People v. Linton* (2013) 56 Cal.4th 1146, 1183; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

We also disagree with defendant's contention that he was prejudiced by the court's ruling because it undermined his claim that, as a result of his drug use, he lacked the specific intent to deprive White of his dog.[1] Stated differently, even if defendant's mother had testified that he once had a small dog, it is not reasonably probable the jury would have found that defendant lacked the specific intent to commit the attempted robbery or

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1 Immediately after instructing the jury on the elements of attempted robbery and the lesser crime of attempted petty theft, the court instructed the jury under CALCRIM No. 3426 on evidence of voluntary intoxication. That instruction emphasized the specific intent requirement of the attempted theft offenses. Specifically, CALCRIM No. 3426 instructed the jury it could consider evidence of defendant's intoxication "only in deciding whether the defendant acted with *the specific intent or mental state required,* e.g.*, 'the intent to permanently deprive the owner of his or her property.' "* (Italics added.) CALCRIM No. 3426 went on to state: "In connection with the charge of attempted robbery and attempted petty theft the People have the burden of proving beyond a reasonable doubt that the defendant acted with the specific intent or mental state required, e.g., 'the intent to permanently deprive the owner of his or her property.' If the People have not met this burden, you must find the defendant not guilty of attempted robbery or attempted petty theft."

otherwise reached a more favorable verdict. (See *People v. Fudge, supra,* 7 Cal.4th at p. 1103 [prejudice from a trial court's evidentiary ruling is reviewed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

As we discussed above, defendant and his mother testified about defendant's extensive drug use and his mental state shortly before the incident at the bus stop. In addition, Dr. Treuting testified that after a methamphetamine binge, a person would exhibit psychosis, be irrational, and lose touch with reality. Notwithstanding all of this evidence of defendant's alleged impairment, evidence which called into question whether defendant could form the requisite intent to commit the crime, the jury found him guilty after deliberating for only 75 minutes. (Cf. *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [stating that the fact the jury deliberated for twelve hours was "a graphic demonstration of the closeness of this case"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [stating that jury deliberations of almost six hours were an indication that the issue of guilt was not "open and shut"].) Defendant also never told White that he wanted Rowdy back, or that Girlie looked like Rowdy. On this record, it is not reasonably probable the jury would have reached a more favorable verdict had defendant's mother testified that he had a small dog named Rowdy. Hence, any error in excluding her proposed testimony does not merit reversal of the judgment.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.